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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO DIVISION)**

21 TIMOTHY BROSNAN, an individual;  
22 CARLA BROSNAN, an individual;

23 Plaintiff,

24 vs.

25 DRY CLEANING STATION, INC.,  
26 a corporation; JOHN A. CAMPBELL, an  
27 individual; does 1 Through 50, Inclusive

28 Defendants.

Case No. CV 08 2028 (EDL)

Assigned For All Purposes:  
Elizabeth D. Laporte

**DEFENDANTS DRY CLEANING STATION,  
INC. AND JOHN A. CAMPBELL'S NOTICE  
OF MOTION AND TO DISMISS  
COMPLAINT; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF**

Hearing Date : 3 June 2008  
Time : 9: A. M  
Location : Courtroom E, 15<sup>th</sup> Flr.

DEFENDANT DRY CLEANING STATION, INC., AND JOHN A CAMPBELL'S  
NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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TIMOTHY BROSNAN/CARLA BROSNAN vs. DRY CLEANING STATION, INC., ET AL.

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**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF DEFENDANTS DRY CLEANING STATION, INC.  
AND JOHN A CAMPBELL'S MOTION TO DISMISS**

DRY CLEANING STATION, INC. and JOHN A. CAMPBELL (collectively, "DCS") respectfully submit this Memorandum of Points and Authorities in support of their Motion To Dismiss Plaintiffs BROSNANS' Complaint in the above-referenced matter.

**I. INTRODUCTION.**

This litigation concerns the business relationship between parties to a written Franchise Agreement. Plaintiffs, husband and wife franchisees of defendant/franchisor DRY CLEANING STATION, INC. ("DCS"), allege that DCS and its chief executive officer (defendant John Campbell) misrepresented "many material facts" about the proposed franchise relationship. Plaintiffs' kitchen sink complaint, originally brought in state court and now removed to this Court, brings claims for fraud, negligent misrepresentation, breach of contract, breach of the covenant of good faith and fair dealing, negligence, breach of fiduciary duty and two alleged statutory violations.

This is a lawsuit that should have never been filed—the Franchise Agreement between the parties (attached as Exhibit A to plaintiffs BROSNAN's Complaint) requires, as a precondition to "initiating any legal action against the other" that the parties mediate first for a minimum of four (4) hours. *p.38, Art. 20.2(A), Exh. A, Pltf. Complt.* Plaintiffs BROSNAN have not met that precondition. In fact, they never once indicated to DCS their request to mediate prior to initiating this lawsuit. This failure is fatal to their claims and warrants

dismissal of this action. Further, under Article 20.2(A)(6) of the Franchise Agreement, DCS is entitled to an award of its attorneys' fees and costs for having to seek this dismissal.

## II. PLAINTIFFS' FAILURE TO MEDIATE PRIOR TO FILING SUIT WARRANTS DISMISSAL OF THEIR CLAIMS.

A motion to dismiss is proper under Federal Rule of Civil Procedure Rule 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. *Fed. R Civ. P. 12(b)(6)*. "A complaint may be dismissed for one of two reasons: (1) lack of a cognizable theory or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). On a motion to dismiss, the complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986).

Where a contract states that mediation is a condition precedent to the right to sue under the contract, a party's failure to submit its claims to mediation prior to filing suit warrants dismissal. *B & O Mfg., Inc. v. Home Depot U.S.A., Inc.*, No. C 07-02864 JSW, 2007 WL 3232276, at \*8 (N.D. Cal. Nov. 1, 2007) (*holding that a party's failure to mediate prior to filing suit in contradiction to a pre-suit mediation provision warrants dismissal of its claims*).

The Franchise Agreement explicitly states that:

... the Company [DCS] and the Franchisee each agree to enter into mediation of all disputes involving this Agreement or any other aspect of the relationship, for a minimum of four (4) hours, prior to initiating any legal action against the other.

*p.38, Art. 20.2(A), Exh. A, Pltf. Complt..*

The federal district court in Kansas recently examined this precise issue in the franchisor/franchisee context. *See R & F, LLC v. Brooke Corp., No. 07-2175-JWL, 2008 WL 294517 (D. Kan. Jan. 31, 2008)*. There, just as here, the plaintiff failed to first mediate prior to filing suit. Rejecting the plaintiff's claims that mediation would be a "hollow exercise", the court ruled that "R & F is not entitled to proceed with litigating this case at all until mediation has been conducted." *Id. at* \*2.

Consistent with these legal authorities, the Court should dismiss plaintiffs' claims and order that mediation occur between the parties as set forth in Article 20 of the Franchise Agreement as a precondition to any further legal proceedings.

### **III. DCS IS ENTITLED TO ITS ATTORNEYS' FEES AND COSTS IN SEEKING THIS DISMISSAL.**

Article 20 of the Franchise Agreement is clear in that if either party fails to first seek mediation prior to bringing an action, "then upon petition of whichever party has a lawsuit . . . brought against it, the court . . . will dismiss the litigation . . . , and award attorneys' fees and costs to the party seeking dismissal in an amount equal to the attorneys' fees and costs the party seeking dismissal incurred." *Complt. Ex. A @ Art. 20.2(A)(6)*. In the instant case, plaintiffs made no attempt to even request mediation prior to bringing this lawsuit. Because plaintiffs did so, DCS have had to needlessly incur the expense of bringing this motion. The parties specifically agreed that should either party force such expense on the other party, the aggrieved party is entitled to recover all of its attorneys' fees incurred in the action. Under these circumstances, DCS requests leave of court to document its attorneys' fees and costs incurred in

1 preparing and bringing this motion, as specifically provided in the agreement between the  
2 parties.

WOLFGANG F. HAHN & ASSOCIATES

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5 Dated: 21 April 2008

By: 

WOLFGANG F. HAHN  
Attorney for Defendants  
DRY CLEANING STATION, INC.  
and JOHN A CAMPBELL